

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

RYAN A.,

Claimant,

vs.

SOUTH CENTRAL LOS ANGELES
REGIONAL CENTER,

Service Agency.

OAH Case No. 2006010332

OAH Case No. 2006010333

DECISION

These matters came on regularly for hearing on May 30, 2006, before Administrative Law Judge David B. Rosenman, Office of Administrative Hearings, in Los Angeles, California. The South Central Los Angeles Regional Center (Service Agency) was represented by Johanna Arias, Fair Hearing Coordinator. Claimant Ryan A.¹ was represented by his mother, Sandra A. Evidence was received and the matter was submitted for decision.

ISSUES

The parties agreed that the following issues are to be determined:

1. Claimant presently receives funding for 32 hours per month of respite services. Claimant would like an increase of 6 hours per month (to 38 hours per month). The Service Agency would like to decrease respite services to 24 hours per month.

2. Claimant requested 12 hours of additional respite services for the school break in December 2005 and January 2006, which was denied by the Service Agency. This time period passed before the hearing. The parties agreed on a schedule for a request for respite services for the school break in December 2006 and January 2007 and for the Service Agency's reply, as set forth below.

FINDINGS OF FACT

The Administrative Law Judge finds the following facts:

¹ Claimant and his mother are referred to in this manner to maintain confidentiality.

1. Procedural history: On December 22, 2005, the Service Agency sent two letters to Claimant's mother, and two Notices of Proposed Action, the first indicating that it denied the request for 12 additional hours of respite for the school holiday break, and the second denied the request to add 6 hours per month of respite services and reduced respite services from the "temporary increase" of 32 hours per month to 24 hours per month. Claimant's mother submitted two fair hearing requests, dated December 30, 2005.

2. Background: Claimant was born November 29, 1994. He was diagnosed with autism at age two and has received services from the Service Agency for many years. His most recent Individual Program Plan (IPP), dated December 1, 2004, indicates that Claimant was receiving the following services from the Service Agency: 32 hours per month of in-home respite; and two hours per week of individual music lessons. Although not listed in the IPP, it was established that the Service Agency also provides funds for a behavior management program for Claimant. The IPP also notes that Claimant's mother receives 141 hours per month of In Home Support Services. (Exhibit 16.) Claimant also receives special education services from the Downey Unified School District.

3. The IPP notes that Claimant's mother is satisfied with the level of 32 hours per month of respite, to "relieve the stress of caring for [Claimant] and prevent burn out." The IPP also notes that Claimant's mother would like respite hours to increase when Claimant is on school vacations since mother "is sick," and that the service coordinator will "explore other alternative generic resources and request [Service Agency] funding in accordance with [purchase of service] guidelines if no other resources are available."

4. With regard to Claimant's behaviors, the IPP notes that Claimant gets aggressive when he is frustrated, will scratch his face and will bite and scratch others, and will jump on others if he sees them lying down. He runs away when given the opportunity, and Claimant's father sleeps in the living room to prevent him from leaving the house during the night.

5. Respite services are provided by Claimant's brother because Claimant communicates in idiosyncratic ways that are understood by his brother. Claimant's mother would like to find someone else to provide respite who can be trained to properly communicate with Claimant.

6. In November 2005, the service coordinator wrote to Claimant's mother to arrange to update the IPP. Although Claimant's mother called and arranged for an appointment, the service coordinator did not appear for the meeting and there was no evidence that the Service Agency has made any other effort to arrange to hold the annual IPP meeting.

7. The history of respite services, as provided in the testimony, was less than clear.² However, the evidence generally established that in July 2003 respite was set at 28 hours (all amounts are per month, unless otherwise specified). There was no evidence of the level of respite prior, except a note of an interdisciplinary team meeting on December 9, 2003, that reported the level was 32 hours “on and off for several months since March 2003.” (Exhibit 12.) There was no evidence of what factors had been considered in establishing the 28 hour level. The same note is confusing in that it states Claimant’s mother has requested an extra 10 hours for the month of December 2003, but also states that mother’s reason for needing 32 hours is “because of her health and [Claimant’s] behaviors.” (The confusion being how 28 hours, and an “extra 10 hours,” amounts to 32 hours? It is assumed that the extra 10 hours was for added respite during the December school holiday.) The note also states respite was at 32 hours for September through November 2003.

8. Following this meeting, Dr. Amuchie wrote to Claimant’s mother on December 11, 2003 (Exhibit 13), to notify her that her request to increase respite from 28 to 32 hours was considered “pending,” awaiting receipt of further information regarding mother’s health, and recommended that Claimant’s mother attend behavior management classes to learn to manage Claimant’s behaviors.

At the hearing, Dr. Amuchie testified that Claimant was authorized to receive 38 hours of respite for the month of December 2003; the respite level was 28 hours thereafter until May 2004, when it increased to 32 hours, and that the level of 32 hours was maintained from that time until the present. Again, there was no evidence, other than as set forth above, of what factors had been considered in establishing the 28, 32 or 38 hour respite levels.

9. Claimant’s most recent requests for additional respite were apparently made in September or October 2005. In a synopsis prepared for an interdisciplinary team meeting for October 6, 2005 (Exhibit 10), the service coordinator noted that mother wanted an increase to 38 hours because Claimant “displays many maladaptive behaviors, such as rubbing himself on others (sexually), aggressiveness toward self and others, and lack of safety awareness (darting).” Also noted is that mother continues to attend to most of Claimant’s self-care and transportation needs, and as Claimant is getting older, “his behaviors continue and have become more difficult to manage due to his increasing physical size. Mother feels that fatigue and stress due to the energy spent on caring for consumer and the rest of her family have become more difficult especially since she is getting older.” Further, the behavior management program, of nine hours per month, was focused primarily on the darting behavior.

² For example, at one point Dr. Amuchie, a program manager at the Service Agency, testified that the level of respite of 28 hours per month was first established in September 2003; but, later, testified that it was first established in July 2003.

10. Following the meeting, in a letter dated October 12, 2005 (Exhibit 11), the service coordinator informed mother, among other things, that he was requesting Claimant's Independent Education Plan (IEP) from the school district and that the respite request would be reconsidered after the IEP was reviewed. The letter also suggested that mother seek an increase in IHSS hours.

11. Claimant's mother requested an increase in IHSS hours. In a letter dated December 15, 2005 (Exhibit 14), the request was denied.

12. The IEP was received by the Service Agency and reviewed by Pamela Colvin-Lee, an education and behavior specialist for the Service Agency. In her notes dated November 5, 2005 (Exhibit 6) and in her testimony, Ms. Colvin-Lee summarized several aspects of the IEP, noting that it had been reviewed to determine if Claimant displayed the severe behavior problems at school that had been reported by his mother.

The summary notes that the IEP, dated May 4, 2005, mentions that Claimant's aggressive behavior had increased "over the past several weeks," and is described as "grabbing an adult hand and putting it under his chin in order to receive deep pressure sensory stimulation." The summary also notes that the IEP mentions that Claimant's "overall behavior has reportedly improved with his greatest area of improvement being his organization and transition."

13. Ms. Colvin-Lee also reviewed the school district's Augmentative Communication Assessment Report (Exhibit B)³, and the assessment and progress report from the behavior management provider (Exhibits C and 15), dated November 2, 2004 (assessment) and October 23, 2005 (progress report). Ms. Colvin-Lee testified that Claimant's behaviors appeared to be inconsistent, but that some are mild and others are moderate, with none being severe. In her opinion, using the grid on the Service Agency's Respite Authorization Worksheet (Exhibit 1), Claimant was "demonstrating intermittent challenging behaviors" but not "ongoing challenging behaviors." Therefore, based on the Worksheet, she believed that the Claimant's behaviors justified a level of respite at 24 hours.

14. The IEP that was reviewed by Ms. Colvin-Lee included information about Claimant's behaviors that goes beyond what she listed in her summary. The IEP is dated May 4, 2005 (Exhibit 5). It notes that Claimant has gotten better about dealing with frustration and is no longer aggressive towards classroom adults and that his aggressive behavior includes biting himself and others. Also discussed at the IEP meeting, all staff working with Claimant were to be aware of the behavior strategies to be used to insure his positive behavior in the classroom (although those strategies were not specified in the IEP).

³ Although this report notes various assessment dates in November 2006, this is obviously an error and probably refers to November 2005.

The IEP also describes, in further detail, Claimant's behavior in seeking physical contact from adults, as either leaning on them or grabbing their hands to put under his chin, whereupon the adults ask if he wants a hug or a squeeze. After he says yes, and the hug or squeeze occurs, Claimant appears satisfied. The goal was to have Claimant request the hug without first initiating physical contact.

The IEP describes behavior wherein Claimant takes off his shirt if it gets wet, and takes off his shoes and socks before entering the library or another area, with a goal of eliminating these behaviors.

Of significance, the IEP attributes Claimant's improvements in behavior to the "constant support of his 1:1 assistant during this time. [Claimant] needs to learn to continue to behave appropriately, even without the support of his one-on-one during this time."

15. The school district's Augmentative Communication Assessment Report (Exhibit B), also reviewed by Ms. Colvin-Lee, was performed by the school district's speech and language pathologist, largely to assess Claimant's means of communications and the therapies he was receiving. In a short portion of the report concerning behavioral observations, it is noted that Claimant needs 1:1 adult assistance and requires frequent verbal and visual prompts.

16. Ms. Colvin-Lee also reviewed the assessment and progress report from the behavior management provider, dated November 2, 2004 (assessment, Exhibit C) and October 23, 2005 (progress report, Exhibit 15). The assessment refers to numerous challenging behaviors, including non-compliant and aggressive behaviors while Claimant was in malls or stores for purposes of escaping from the family, lack of safety awareness, and the need for constant supervision. There was no "cue" for Claimant's aggressive behaviors. The assessment notes that, although these behaviors occur in all settings, they are most frequent in the home after Claimant returns from school. Aggressive behaviors include scratching, biting, hitting and/or kicking. The running behavior has been present since age two, and includes running into or across streets with no safety awareness.

The assessment concludes with a note that California Pediatric & Family Services, Inc. (CPFS) mainly provides training to families in behavior management techniques and that mom had requested one-to-one intervention between Claimant and a behavior consultant. Nevertheless, CPFS recommended behavior management services of 16 hours per month for four months, and two hours for report writing and processing.

17. Behavior management services began in November 2004. The only other evidence of CPFS's services is the progress report dated October 23, 2005 (Exhibit 15), covering a two month period of service. This report notes that services are focused on Claimant's behavior of darting/running away, and that the frequency has reduced from seven to two times per day in the home setting. The antecedent to the behavior was determined to be any form of distraction, and Claimant was being taught to ask permission to explore before moving away. It is noted that, along with some improvement, there was also some

regression, which may have been contributed to by mom's failure to use appropriate commands. It was recommended that services continue at nine hours per month for two months, plus two hours for report writing and processing (apparently, this was the existing level of services at that time).

18. The latest report received in evidence is from DINJES Inc., dated March 15, 2006 (Exhibit A). DINJES provides music therapy to Claimant, paid for by the Service Agency. This report indicates that it is being written at mother's request and only addresses one aspect of the services for Claimant, i.e., to decrease inappropriate social behavior. The behaviors noted are that Claimant: locks himself in the room without adult supervision at the beginning of each session; yells and scream; takes off his clothes in front of his peers; hits and bites others; throws objects; tantrums during transition from one task to another; and puts himself and others in danger. The report also notes that Claimant needs supervision at all times. After it was observed that he could not function well in a small group of five, DINJES recommended individual services, which are now being provided for 30 minutes each week.

19. In response to a request from the Service Agency concerning the medical condition of Claimant's mother, she supplied a note from her physician, Dr. Hector Gonzalez, dated February 9, 2006 (Exhibit 9), indicating her diagnosis of diverticulosis associated with chronic spastic colitis. Dr. Gonzalez believes that her prognosis is good, providing that she follows a diet, takes anti-spasmodic medication, and is "able to control her acute anxiety attacks for which patient should be treated by a psychologist."

20. Bruce Williams, Ph.D., a psychologist for the Service Agency, wrote a progress note dated February 28, 2006 (Exhibit 3) assessing Claimant's behaviors to determine if respite should be increased to 32 hours. Although noting a history of behavior problems, Dr. Williams stated that Claimant's "behavior problems do not appear to be severe" and "the reported level of behavior is commensurate with a lesser number of hours." Dr. Williams, citing the CPFS progress report of October 23, 2005 (Finding 17), notes the only behavior problem at home is "darting away" on community outings. He also notes that the IEP (Finding 14) has, as its only behavioral concern, that Claimant has physical contact with adults to seek a hug. Dr. Williams emphasized those portions of the IEP indicating lack of aggression in the classroom and the possibility of mainstreaming if Claimant "continues to demonstrate appropriate behavior."

21. The Service Agency's decision to reduce respite hours from 32 to 24 is based on applying the information available to a worksheet (Exhibit 1). The worksheet has five columns with increasing levels of respite care; as relevant here, Level B, up to 24 hours; Level C, up to 32 hours; and Level D, up to 40 hours. The worksheet has five rows with different subjects to be considered, under the headings: medical, behavior, self-care, caregiver condition, and family stress. Each of these rows has written descriptions, under the different columns for respite levels, demonstrating an increasing need for respite care as the seriousness of the situation deepens as measured by the five subject headings.

The service coordinator completed the worksheet for Claimant on February 28, 2006, indicating Level B (up to 24 hours), for the subjects of medical, behavior, self-care and family stress, and indicating Level C (up to 32 hours) for caregiver condition. It is the policy of the Service Agency that at least three subjects/rows must be evaluated at a particular level of respite hours for that level of hours to be granted.

Because four of the subject headings were evaluated at Level B, the Service Agency contends that Claimant is only entitled to 24 hours of respite. The worksheet, and a separate narrative explanation sheet (Exhibit 2), refer to the same factors as noted in Findings 12, 13, 15, 16, 17, 19 and 20.

22. With respect to mother's request for extra respite during the school winter recess, it was determined that the hearing request was specific to the period December 2005 to January 2006 and, therefore, could not be remedied after the fact. However, as this is a continuing issue, the parties agreed that, for the school winter recess beginning in December 2006, any request for extra respite hours would be submitted by September 1, 2006, and that the Service Agency would reply by September 30, 2006. This schedule should allow sufficient time for a dispute, if any, to be resolved before recess begins.

23. Legal principles: Various portions of the applicable law (the Lanterman Act (Welfare and Institution Code sections 4700 – 4716) and California Code of Regulations, title 17) may apply to Claimant's request.⁴ For example, Code section 4648 requires the regional centers to secure services to carry out the Legislative intent for clients to achieve the greatest self sufficiency possible and to meet the needs of the consumer as identified in the consumer's individual program plan. The regional centers are directed to pay for services at a rate that ensures that the provider can meet the consumer's special needs and "provide quality services and supports in the least restrictive setting." (*Id.*)

The relationship between the law, the disabled residents of California, the Department of Developmental Services (DDS) and regional centers is explained in the case of *Clemente v. Amundson and North Bay Regional Center* (1998) 60 Cal.App.4th 1094, 1097-8:

"The California Legislature enacted the Lanterman Act in 1977 'to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community . . . and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community.' (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388 [211 Cal. Rptr. 758, 696 P.2d 150].) . . . [T]he Lanterman Act permitted many individuals previously placed in state hospitals to be housed and effectively treated in less restrictive community settings.

⁴ All statutory references are to the Welfare and Institutions Code.

“Under the Lanterman Act, ‘[t]he State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge.’ (§ 4501.) The state also recognizes that ‘[p]ersons with developmental disabilities have the same legal rights and responsibilities [as those] guaranteed all other individuals by the United States Constitution and laws and the Constitution and laws of the State of California.’ (§ 4502.) Statutory rights include ‘[a] right to treatment and habilitation services and supports in the least restrictive environment’ at state expense. (§ 4502, subd. (a), § 4620, §§ 4646-4648; see also *Association for Retarded Citizens v. Department of Developmental Services*, *supra*, 38 Cal.3d at p. 389.) The Supreme Court construed the Lanterman Act to grant developmentally disabled persons ‘the right to be provided at state expense with only such services as are consistent with its purpose.’ (*Id.* at p. 393.)

“The Lanterman Act authorizes DDS to contract with regional centers . . . to provide developmentally disabled individuals with ‘access to the services and supports best suited to them throughout their lifetime.’ (§ 4620.) The regional centers are operated by private nonprofit community agencies. (*Ibid.*) The rights of developmentally disabled persons and the obligations of the state toward them are implemented through individual program plans (IPP) which regional centers must develop for each client. (§ 4646, 4647; *Association for Retarded Citizens v. Department of Developmental Services*, *supra*, 38 Cal.3d at p. 390.)

“DDS is authorized to promote uniformity and cost-effectiveness in the operation of regional centers. (*Association for Retarded Citizens v. Department of Developmental Services*, *supra*, 38 Cal.3d at p. 389, citing § 4631, subd. (a), § 4681, and § 4780.5.) The responsibility of DDS ‘does not extend to the control of the manner in which [regional centers] provide services or in general operate their programs.’ (*Association for Retarded Citizens v. Department of Developmental Services*, *supra*, at pp. 389-390.)”
[Footnotes omitted]

24. Throughout the applicable statutes and regulations, the state level fair hearing is referred to as an appeal of the Service Agency’s decision. Therefore, Evidence Code section 500 would apply to place the burden on the party seeking to establish the facts “essential to the claim for relief” being asserted. In this case, as the Service Agency seeks to reduce a service, it has the burden of proving the facts supporting that reduction. The Claimant seeks to increase a service and has the burden of proving the facts supporting that increase.

25. Respite services are defined in California Code of Regulations, title 17, section 54302, subdivision (38):

“ ‘In-home Respite Services’ means intermittent or regularly scheduled temporary non-medical care and supervision provided in the consumer’s own home and designed to do all of the following:

“(A) Assist family members in maintaining the consumer at home;

“(B) Provide appropriate care and supervision to protect the consumer’s safety in the absence of family members;

“(C) Relieve family members from the constantly demanding responsibility of caring for a consumer; and

“(D) Attend to the consumer’s basic self-help needs and other activities of daily living, including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by the family member.”

CONCLUSIONS OF LAW AND DISCUSSION

1. The Service Agency made a good faith attempt to analyze the need of Claimant and his family for the appropriate level of respite care. Claimant’s mother complied with the Service Agency’s request to update Claimant’s IPP, to supply information relating to the need for respite services, and to request added IHSS hours.

2. Several aspects of the process used to evaluate Claimant’s need for respite are suspect. There was no consideration of the claim by Claimant’s mother that there are additional behaviors of significance; specifically, maladaptive sexual behaviors and the point that, as Claimant becomes older and grows larger, and as mother becomes older, it is more difficult for her to manage his behaviors (Finding 9). Mother’s report of sexual behaviors is consistent with her concern that, as Claimant gets older, his behaviors may become more difficult to manage.

3. The Service Agency did not evaluate all of the evidence of Claimant’s behaviors that would affect the determination of the level of needed respite. The Service Agency’s evaluation of the available information does not demonstrate an appreciation that Claimant’s behaviors at school are likely to present fewer challenges due to the presence of a 1:1 aide who is immediately and exclusively able to attend to Claimant. Further, the IEP stated that aggressive behavior was increasing. The evidence established that Claimant’s behavior at home creates challenges to the family that go beyond those present in the school setting, and that the behavior management program was limited to addressing the behavior of darting off.

4. It is difficult to compare the present scenario with the considerations that resulted in the Service Agency’s agreement to provide respite in the past at levels of 28 and, more recently, 32 hours. Further, there is insufficient evidence to establish that the policy of the Service Agency to grant respite hours based on the levels set by the worksheet (Finding 21) appropriately addresses the specific factors supporting Claimant’s need for respite. Even if there are fewer than three subject headings of the worksheet that indicate a level of respite of up to 32 hours, a particular consumer’s situation may justify that amount.

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5. A party who desires to change the present level of services should demonstrate that some change in circumstances justifies a different level. The Service Agency established the present level of 32 hours of respite as the level that was appropriate to meet Claimant's needs. The Service Agency has not established a sufficient change in circumstances to support reducing this level.

6. Nor has Claimant submitted sufficient evidence to support an increase in respite from the level of 32 hours. However, the Service Agency should perform a more comprehensive review of the factors identified herein, and in whatever other source information it can develop, to be able to properly evaluate the factors identified in the request for services from Claimant's mother.

7. To address these issues, as well as the failure to convene the IPP meeting, an IPP meeting should take place within 45 days.

8. The parties have agreed to a process to address the possible need for increased respite for the upcoming school winter recess (Finding 22).

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Claimant's appeal of the Service Agency's decision to reduce funding for respite services is granted.

2. Claimant's appeal of the Service Agency's decision to deny an increase in respite services is denied.

3. Respite shall continue at the level of 32 hours per month, subject to being modified at an IPP meeting or due to any demonstrated change in circumstances from the present.

4. For the school winter recess beginning in December 2006, any request for extra respite hours will be submitted from Claimant by September 1, 2006, and the Service Agency will reply by September 30, 2006.

DATED: June 8, 2006.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings

This is the final administrative decision in this matter. The parties are bound thereby. Either party may appeal this decision to a court of competent jurisdiction within 90 days of having received notice of it.